82-1847

IN THE

Supreme Court of the United States

1982-1983 TERM

No. .....

RHODA STRICKLAND, as Personal Representative of Joseph Strickland, deceased,
Petitioner,

vs.

ROOSEVELT COUNTY RURAL ELECTRIC COOPERATIVE, CYRIL E. CARTER, SECURITY INSURANCE COMPANY OF HARTFORD,
Respondents.

ON WRIT OF CERTIORARI TO THE NEW MEXICO COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the 14th Amendment, U.S. Constitution demand the payment of pre-judgment interest to the judgment creditor?

2. Is the denial of pre-judgment interest a discrimination and a denial of Constitutional equal protection of the laws in New Mexico wrongful death case?

3. Is State of New Mexico "judicial discretion" awarding or denying pre-judgment interest a denial of Constitutional government and an assertion of absolute judicial autocracy?

4. Is it a denial of equal protection and due process for the State of New Mexico to provide specifically and solely how damages for Wrongful Death shall be proven and when proof as demanded is made and no contradictory evidence is offered to place on the Plaintiff a "burden of persuasion" to convince the jury to allow the sole amount in evidence?

5. Is the "burden of persuasion" a discrimination against a plaintiff and a lack of due process and a denial of equal protection?

6. Do 14th Amendment violations which could be litigated in Federal Court under 42 U.S.C. § 1983 have a right of review in the Court even though the actions came up through State Judicial Channels and where the Constitutional violations occurred in the course of the State Judicial proceedings in a Wrongful Death case?

7. Is there really a viable 14th Amend. protection for State Court violations (Color of Law)?

8. Should those who exhaust State remedies be subjected to an "aboslute discretion" for certiorari here?

9. Does the payment of taxes to the Federal Government for support and maintenance of the Central Government in Washington entitle the individuals to something more than an "absolute discretion" to review 14th Amend. violations by the State government?

10. Should liability insurance companies be permitted to continue to act against public policy and violate the fundamental meaning of "interest" as earning power of money and continue violating the 14th Amend. in doing so?

11. Does the 14th Amendment, U. S. Const., protect a Party from a denial of a New Mexico Constitutional right to have the liability carrier named.

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Petitioner, Rhoda Strickland, as Personal Representative, petitions for a Writ of Certiorari to review the Opinion of the New Mexico Court of Appeals entered on February 7, 1983.

QUESTIONS PRESENTED

1. Does the 14th Amendment, U.S. Constitution demand the payment of pre-judgment interest to the judgment creditor?

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11. Does the 14th Amendment, U. S. Const., protect a Party from a denial of a New Mexico Constitutional right to have the liability carrier named.

OPINIONS BELOW

The pertinent portions of the Opinion from the New Mexico Court of Appeals appear in the Appendix B. The full Opinion is reported in 657 P.2d 1184. The Judgment of the trial court and pertinent portions of a separate Order of the trial court denying prejudgment interest appear in Appendix G.

PARTIES

Parties to the proceeding in the court whose judgment is sought to be reviewed were Rhoda Strickland, Roosevelt County Rural Electric Cooperative, Cyril E. Carter, and Security Insurance Company of Hartford.

JURISDICTION

The Mandate, Judgment and Opinion of the New Mexico Court of Appeals was filed on February 7, 1983. The original Opinion by the New Mexico Court of Appeals was issued on December 9, 1982. A timely Motion for Rehearing was denied by the New Mexico Court of Appeals on December 22, 1982. A timely Petition for Certiorari to the New Mexico Supreme Court was filed on January 11, 1983, a bare denial of which was filed in the Court of Appeals on February 7, 1983. On the same date, February 7, 1983, the Judgment, Mandate and Opinion of the Court of Appeals was issued. Appendix .

A Motion for Stay of Mandate was filed in New Mexico Court of Appeals but denied on February 10, 1983. The case was returned to the District Court for Bernalillo County, New Mexico and received there on February 11, 1983. A Motion for Judgment on the Mandate has been filed there. A hearing on said Motion has not yet been held.

This Court has jurisdiction of this cause under 28 U.S.C. § 1257, as this is a Petition for Certiorari from the aforesaid Judgment, Mandate and Opinion of the State of New Mexico Court of Appeals.

Assertions of Federal Jurisdiction below appear in App. C & E.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment 14, U.S. Constitution, Section 1. Citizens of the United States. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment 14, U.S. Constitution, Section 5. Power to enforce amendment. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Article II, Sec. 18, New Mexico Constitution: No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person. The effective date of this amendment shall be July 1, 1973. (As amended November 7, 1972).

STATEMENT OF THE CASE

Plaintiff Rhoda Strickland brought this wrongful death action in 1977 in Bernalillo County District Court as the Personal Representative of the estate of her husband, Joseph Kay Strickland, deceased. (Tr. 1). Joe Strickland died on September 8, 1976, at the age of 27, on the farm of Defendant Cyril E. Carter which is located near Clovis, New Mexico. (Tr. 2). Joe Strickland was a truck driver for Blakley & Sons trucking company and was delivering a truck-load of soil conditioner to the Carter farm at the time of his death. (Tr. 753-4, 761). He died by electrocution when the truck he was driving came in close proximity to the overhead electrical wires installed, repaired and maintained by Defendant Roosevelt County Rural Electric Cooperative. (Tr. 773, 1044, 1059, 1060).

At the time of his death he had a work life expectancy of 34.25 additional years. (Tr. 827).

Security Insurance Company of Hartford paid workmen's compensation benefits to Rhoda Strickland, to Joe Strickland's natural son and to his step son, for this death which occurred during employment. After Plaintiff brought this wrongful death action, Security moved to intervene. (Tr. 67). Prior to trial Plaintiff Strickland filed a Motion to name Defendant's insurers as party-defendants because of the presence of Security Insurance Company as a Plaintiff. (Tr. 422). That Motion was denied by the trial court (Tr. 441) and the Court of Appeals affirmed that decision.

The case was tried to a jury on September 29, 1981 through October 3, 1981, with Judge Harry E. Stowers, Jr., presiding. The evidence as to damages was two-fold: 1) that Joseph Strickland experienced pain and suffering before he died (Tr. 801, 942) and 2) that the present monetary value of his life was between $325,000 and $372,000. (Tr. 836-39). The only evidence as to the economic loss came from Melissa Patterson, the economist called as a witness by Plaintiff: Defendants did not present any economic evidence to refute the damage figures testified to by Melissa Patterson. Following the criteria established in *Verney v. Taylor*, 79 N.M. 652, 448 P.2d 164 (1968) for measuring economic loss due to wrongful death, Melissa Patterson testified that the economic loss resulting from Joe Strickland's death was between $325,000 and $372,000 (Tr. 836-39). The economist testified that the future lost earnings, after deducting taxes and personal maintenance, was $321,703 if the amount was discounted at 10% and was $274,891 if discounted at 12%. (Tr. 836-7). In addition the past wage loss, for the 5

years between the death and the trial, was calculated to be $50.000 (Tr. 839). App. H.

In addition to the economic loss there was also undisputed testimony of pain and suffering experienced by Jo Strickland before he died. The pathologist testified that the burns on decedent caused by the electrocution would be painful and that the interruption of the heart beat by the electrocution would cause a severe crushing chest pain. (Tr. 801). Defendant Carter testified that after he was electrocuted, Joe Strickland fell to the ground, face down and yelled several times (Tr. 938, 942). Joe Strickland had a very fast pulse and was obviously alive when Defendant Carter left him. (Tr. 942). Joe Strickland's death was not instantaneous and he did exprience pain and suffering before he died.

Despite the evidence of pain and suffering and the evidence of an economic loss of over $300,000, the jury returned a verdict of only $105,000. The jury's verdict was that Defendant Roosevelt County Rural Electric Cooprative alone was liable for Joseph Strickland's death. (Tr. 567). The jury found that Joe Strickland was not contributorily negligent and that Defendant Carter was not negligent. (Tr. 567). Plaintiff made a motion for an additur or in the alternative for a new trial against Defendant Roosevelt County Rural Electric Cooperative on the issue of damages. (Tr. 575). That Motion was denied by the trial judge (Tr. 591) and the Court of Appeals affirmed. Petitioner claims error because of the Court of Appeals' refusal to grant a new trial because of the inadequate damages awarded. App. G.

Plaintiff also moved after trial for an order allowing prejudgment interest and requested that the trial court eliminate or reduce the amount to be reimbursed to the

workmen's compensation carrier. The trial court denied those motions. (Tr. 612). The court entered Judgment on February 1, 1982, in favor of the Plaintiff against Defendant Roosevelt County Rural Electric Cooperative in the sum of $105,000 and in favor of Defendant Carter. (Tr. 614). The Judgment further stated that interest was to accrue from the date of the Judgment and that Security Insurance Company was to be reimbursed in full. (Tr. 615). The Court of Appeals affirmed those decisions of the trial court. App B, G.

REASONS FOR GRANTING THE WRIT

Denial of prejudgment interest to Plaintiff in a Wrongful Death case is a taking of property without due process. It is a denial of Equal Protection. It is a denial of Privileges and Immunities. It is discriminatory state action. It violates 14th Amend. and 42 U.S.C. § 1983.

1. Prejudgment interest:

The Court of Appeals' Opinion denying prejudgment interest is in conflict with *State Bank v. Hermosa*, 30 N.M. 566, 240 P. 469 (1925). At page 596, the Court in *State Bank* held:

> "On general principles, once admitted that interest is the natural fruit of money, it would seem that wherever a verdict liquidates a claim and fixes it as of a prior date, interest should follow from that date."

This Opinion is also in conflict with *Shaffer v. Kelton*, 95 N.M. 182, 619 P.2d 1226 (1980) wherein this Court stated, at 187:

> "In New Mexico, damage awards should fully compensate the injured party, whether the action is one in contract or in tort. Terrell v. Duke City Lumber Company, 86 N.M. 405, 524 P.2d 1021 (Ct.App. 1974).

> "[p]laintiff seeks interest as damages for the breach of a contractual duty and the injury caused by deprivation of the promised performance. . . . Simple interest is allowed as a means of estimating these probable gains and as compensation for their prevention.
>
> "(a) Where the defendant commits a breach of contract to render a performance the value of which in money is ascertainable by mathematical calculation from a standard fixed in the contract or from established market prices of the subject matter, interest is allowed on the amount of the debt or money value from the time performance was due. . . . [i]n our judgment, the instant case falls under the provisions of subsection (a) and interest should be awarded as a matter of right.

This Opinion is further in conflict with this Court's Opinion in *Hellelson v. Republic Insurance Co.*, 96 NM. 36, 38, 627 P.2d 878 (1981) where the Court stated:

> "While interest could not be claimed as a matter of right in the absence of an express agreement at early common law, according to the modern viewpoint, there are many circumstances where interest can be so claimed. 45 Am.Jr.2d Interest and Usury §34 (1969). We think this is an appropriate situation within the latter rule."

The Court of Appeals Opinion here is in conflict with the cited decisions when it states, at page 10.

> "[t]he view most favorable to plaintiff is that prejudgment interest in a wrongful death case is a matter of discretion."

The issue of prejudgment interest also involves a significant question of law under the New Mexico Constitution, 14th Amendment. As the cases discussed in the

argument on prejudgment interest hold, prejudgment interest is mandatory because it is money which belongs to the prevailing plaintiff. Since that is so, it is an unconstitutional deprivation of property not to give a plaintiff the money which she owns. It is also an unequal protection of the law because plaintiffs in wrongful death cases are treated unequally in comparison to other owners of money.

This issue of prejudgment interest further presents an issue of substantial public interest which should be determined by the Supreme Court. As discussed more fully in the argument section, prejudgment interest should be awarded in wrongful death cases in order to induce defendants to make timely, reasonable offers of settlement. If prejudgment interest were mandatory, defendants and insurance companies would not have the incentive they now have to prolong litigation. Prejudgment interest would therefore help alleviate court congestion and delay. *In Re Air Crash*, 644 F.2d 633, is based on an analysis of the Illinois Wrongful Death Statute. All prior Illinois decisions indicated "no". The 7th Circuit simply went against prior precedent. In doing so *Erie Ry v. Tompkins*, must have been ignored. In interpreting the Illinois Wrongful Death all the court concluded that full compensation was not paid to the survivors and therefore prejudgment interest was necessary in order to give the survivors their just rights. The 7th Circuit did not discuss Federal Constitutional rights. However, a higher principle of decision than interpretation of an Illinois Statute is necessarily involved. We submit that it is the 14th Amend., U.S. Const. that no person should be deprived of his property without "due process" of law. The 7th Circuit's examination of what the beneficiaries received showed that this was inadequate without pre-

judgment interest. *In Re Air Crash*, p. 643, supra. The conclusion seems inevitable that the decision was on constitutional grounds as the 7th Circuit had no authority to refuse to apply Illinois law when Illinois has spoken on the subject which they had. *Klepser v. Std. Service Refuse Disposal Co.* cited in *In Re Air Crash*, supra. *In Re Air Crash*, supra, goes to other Illinois cases on Wrongful Death for support, e.g. *Morton Grove Park District v. American National Bank*, 78 Ill.2d 353, 399 N.E.2d 1295 (1980) and in doing so went to a constitutional principle "so the county treasurer's keeping the interest earned constituted a taking of private property for public use." This rational is clearly the basis of *In Re Air Crash Disaster*, supra; and, it is a Constitutional duty. Since the 7th Circuit is a Federal Court it must be the Federal Constitution which was applied. The same basic reason for prejudgment interest exists in this New Mexico case viz the award was grossly inadequate. Specifically, damages on Wrongful Death in New Mexico are economic. (See App. H U.J.I. Instructions). The whole amount was subjected to a discount including that amount of the judgment representing the time between the death and the payment of the Judgment. Without pre-payment interest the Wrongful Death beneficiaries were being deprived of the damages allowed by New Mexico law. New Mexico does allow damages for the pain and suffering of the decedent however this could not have been the subject of a discount for the future because there was no future here below for the decedent. Therefore, whatever amount, if any, was included within the Judgment for pain and suffering prior to death was kept from the Plaintiff and in the pockets of the defendant insurance companies during the prejudgment period. If we accept the theory that prejudgment interest is an essential part of a damages award, then the failure of the State of New Mexico to

allow it would be State action prohibited by the 14th Amend. If the 7th Circuit's reference to a "condemnation" award was applied to the Wrongful Death case then even more clearly is the basis Constitutional "keeping the interest earned constituted a taking of private property for public use." It is true that the defendant in our case, a Coop supplying electricity is not a "county treasurer" and that the Federal Constitutional basis for *Morton Grove v. American National Bank*, supra, are different. Also in *Morton*, supra, interest was during the appeal period and the "award earned $92,357.08". "We hold that to deprive the owners of these earnings would violate their constitutional rights." A quote from *Morton*, supra, vocalizes our position "The county had the use of the award money for 30 months. The earnings on the funds deposited are a mere incident of ownership of the fund itself". P. 1299.

It is a Federal Constitutional issue? There is no reason why Illinois should grant prejudgment interest to statutory beneficiaries and New Mexico should not. New Mexico's late arrival into the union should not deprive her citizens of full Constitutional protection.

Basically the real meaning of interest controls and the answer to the question "TO WHOM DOES INTEREST BELONG?" supplies the answer. A universal economic law is superior to any legalistic approach. That universal law says that Interest is the earning power of money. It therefore belongs to whoever owns the money. From the date of the wrongful death, liability attaches vel non. The money did not belong to the insurance company in the interim. See Black's Law Dictionary, Fifth Edition, 1979, App. F; also, Webster Third New International Dictionary, App F; also *National Air Lines v.*

Stiles, 268 F.2d 400, 404; *Rosen v. U.S.A.*, 288 F.2d 658 (1961) (CCA 3rd); *Samen Corp. v. S. S. Rivadeluna*, 277 F. Supp. 943 (1967). *Miller v. Robertson*, 266 U.S. 243, 69 L.Ed. 265, 275 (1924) says "compensation is a fundamental principle of damages whether the action is in contract or tort". Also, "One who has had the use of money owing to another justly may be required to pay interest from the time the payment should have been made".

To deny prejudgment interest is to take one person's property and let another keep it when the money from which the interest accrued did not belong to him. Insurance companies set up reserves for specific losses. Those reserves belong to successful claimants. There was insurance for the defendant in this case. We are opposing a huge vested nationwide interest which pockets money not their own, and then can delay payment of claims in order to garner all the more. It is a national scandal and when the New Mexico State Trial Court and the Court of Appeals say that it is "discretionary" we make the 14th Amend. enforcement paternalistic.

Plaintiff requested the trial judge to award prejudgment interest (Tr. 595). The trial court denied that request and entered a Judgment which allowed interest at 6% only from the date of the Judgment. (Tr. 612). The Court of Appeals affirmed that decision, holding that while prejudgment interest in a wrongful death case may be discretionary, there was no abuse of discretion in denying prejudgment interest in this case. Recent decisions from many jurisdictions, discussed below, hold that prejudgment interest in wrongful death cases is a matter of right.

In *Shaeffer v. Kelton*, 95 N.M. 182, 188, 619 P.2d 1226 (1980), this Court held that prejudgment "interest should be awarded as a matter of right" in certain cases.

The Court in *Air Crash Disaster Near Chicago*, 480 F. Supp. 1280, 1284, fn. 4 (N.D. ILL., 1979) dealt with this precise issue and noted that plaintiffs' damages in wrongful death cases are reasonably ascertainable. The Court there stated at page 1285 that "plaintiffs' damages arose and were calculable as of the date of the crash." The Court there rejected the contention that prejudgment interest in wrongful death cases is discretionary. The Court explained, at p. 1286-1287:

> "Like the courts in Stiles and Wetz, we believe that "fair and just compensation" must include interest on a judgment in a wrongful death case from the date of death. The losses suffered by the decedent's survivors arise at the moment of the decedent's death; the award of judgment in a subsequent wrongful death suit is merely an ex post facto determination of a preexisting obligation. Unless prejudgment interest is available, the survivors suffer the additional loss of the income from the damages they incurred on the date of death.

State v. Phillips, 470 P.2d 266, says,

> "The law recognizes the earning potential of money by requiring that an award for future damages such as lost future income be discounted to its present value. It is inequitable to allow a defendant in a wrongful death action to obtain the benefit of discounting any judgment to present value while not allowing a plaintiff to obtain the benefit of prejudgment interest. Under the general rules governing damages in a wrongful death action, a trier of fact takes into account postjudgment interest and discounts any judgment to compensate for interest which

the plaintiff can earn on it. The benefit to the defendant of this accounting in determining damages is apparent. However, inequity obviously results if the defendant gets the advantage of this accounting for postjudgment interest but the plaintiff does not get the corresponding advantage of prejudgment interest."

Similarly, in *West v. Harris*, 583 F.2d 873 (5th Cir., 1978) the Court held that prejudgment interest was mandatory. That case was an action to recover damages under the National Flood Insurance Act. The Court there held, at pages 882-883:

"[t]here remains an issue whether an award of prejudgment interest is required as a matter of federal law. We conclude that it is.

. . .

"As the common law recognizes in analogous situations, the only way the wronged party can be made whole is to award him interest from the time he should have received the money.

The Court in the *Air Crash* cases cited *State v. Phillips*, 470 P.2d 266 (Alaska, 1970). In that wrongful death case, prejudgment interest was held to be mandatory. It explained its decision as follows, at pages 274-175:

"Courts in other jurisdictions and commentators have over the years been moving away from medieval religious notions that all interest was evil toward recognition by awarding prejudgment interest of the economic fact that money awarded for any reason is worth less the later it is received.

. . .

"For a cause of action to accrue, one party must have breached a duty to the other, and the other must have been injured. At the moment the cause of action accrued, the injured party was entitled to be left whole and became immediately entitled to be made whole. Whenever any cause of action accrues, there-

fore, the amount later adjudicated as damages is immediately "due". All damages, then, whether liquidated or unliquidated, pecuniary or nonpecuniary, should carry interest from the time the cause of action accrues."

The Court went on to note, at page 273, fn. 27, that discretion in awarding prejudgment interest is indefensible:

> "The Stanford Law Review comment argues that during the time between accrual of the cause of action and judgment, plaintiff loses and defendant gains the use of the money determined to be owing, whether, no distinction between liquidated and unliquidated claims is justified. Likewise, no distinction between pecuniary and non-pecuniary injuries is justified, for defendant has unjustly enjoyed the use of amount with which the law requires him to compensate plaintiff between accrual of the cause of action and judgment. *Discretion of the jury in awarding interest is indefensible, because it must lead to irrational results; where prejudgment interest is proper, it should be mandatory.*"

Prejudgment interest should be awarded in wrongful death actions in order to fairly and fully compensate plaintiffs for their loss. As the cases cited above hold, prejudgment interest is mandatory because it compensates for part of the damages suffered. There is another policy reason discussed by many courts and commentators as a further reason for awarding prejudgment interest in wrongful death cases - to give defendants an incentive to make reasonable settlement offers early in the case. By a rule of civil procedure, trial courts in Pennsylvania are directed to add prejudgment interest to wrongful death, as well as other torts, as verdicts. In discussing the purpose of that rule, the Supreme Court of Pennsylvania

stated in *Laudenberger v. Port Authority*, 436 A. 2d 147, 156 (Pa. 1981):

> "[t]he plaintiffs have been wrongly injured and have suffered financial losses because of the defendant's action. The losses then become exacerbated by defendants' refusal to settle the lawsuit in a timely fashion. The defendants, on the other hand, have suffered no wrong. They, as the tortfeasor, are not justly deprived of compensation during the course of pre-trial delays. On the contrary, it is in the best interests of the defendants to protract the litigation process as long as possible, so that they may benefit from the funds rightfully owing to the plaintiffs."

The most recent comment on awarding prejudgment interest in order to encourage early settlement appears in the January 1983 issue of the American Bar Association Journal (Vo. 6a). In a guest article entitled "Court delay: Some causes and remedies" at pages 12-13, the author notes one reason for court delay:

> "Almost all tortious injuries and deaths are caused by a corporation that may be self-insured or by an individual covered by insurance. When they may be liable for a tortious act, a reserve fund of the estimated cost of disposition of the case is set up by the corporation or insurance company. This fund is invested in the highest yielding interest return available.
>
> "On the other hand, claimants have only a right of action against the tortious wrongdoer. If suit is filed and it takes four to five or more years for the case to be decided, the injured parties get nothing throughout the delay, while the corporation or insurance company is reaping compound interest. The longer the delay, the greater the interest return.
>
> . . .
>
> "We must recognize, however, that when a wrong is committed, as of that instant the tortfeasor or

wrongdoer owes the victim redress - not five years later. The reserve fund and its interest belong to the victim. The delayed trial merely determines at a later date the rightful owner and the monetary extent of his ownership of the reserve fund."

There are two rules in New Mexico which operate to reduce the amount of a plaintiffs' recovery: Rule 68 of the Rules of Civil Procedure and the rule requiring discounting to present value.

Rule 68 provides an inducement to plaintiffs to settle. It takes something away from the plaintiff that is costs, to which they are ordinarily entitled, if a trial judgment is less than defendant's offer of settlement. Prejudgment interest could be an equalizing factor by inducing defendants to make reasonable and timely offers of settlement.

The rule requiring discounting of future damages to present value ensures that plaintiffs will not receive more than a fair and full recovery. If future loss is discounted, it is fair for past damages to be appreciated to present value, by adding prejudgment interest. This unfairness was discussed in an article entitled "Prejudgment Interest in Personal Injury Litigation: A Policy of Fairness" which appeared in Vol. 5:81 of the American Journal of Trial Advocacy at pages 81-93. At page 89 the authors stated:

> "In summary, what is sauce for the goose is sauce for the gander. If the defendant, for the purpose of avoiding overpaying the plaintiff, can reduce the plaintiff's future losses to their present worth, even by reference to a speculative rate of interest, then the court, to avoid underpaying the plaintiff, should likewise permit the plaintiff to recover the loss of the use of the money in the past, by reference to a rate of interest which is not speculative."

The case for prejudgment interest in all types of cases seems well-established in New Mexico. As far back as 1925 in *State Bank v. Hermosa*, 30 N.M. 566 (1925), the Supreme Court of New Mexico not only decided in favor of prejudgment interest but analyzed the matter, pointing out the error, injustice and illogic of a position to the contrary. The court directly met a false concept that had been used against successful claimants on unliquidated claims which made a distinction between liquidated and unliquidated claims, allowing interest in one and denying it in the other for the simple reason that one was liquidated and the other unliquidated. In refuting the distinction, the Court, at page 596, quoted from Sedgwick on Damages §300:

> "There is no reason why a person injured should have a smaller measure of recovery in one case than the other. There is no reason why the damages to be paid by the defendant should be mitigated or reduced by the circumstances that his tort or breach of contract was of such an aggravated or cunningly perfidious character as to make a liquidation of the claim against him difficult. On general principles, once admitted that interest is the natural fruit of money, it would seem that wherever a verdict liquidates a claim and fixes it as of a prior date, interest should follow from that date.

The fundamental principle involved is not merely an abstract legal principal. The fundamental is that the earning power of money does not belong to the entity who is holding possession but belongs to the owner of the money. We submit that a tortfeasor is less entitled to keep interest than a person breaking a contract, which is a private agreement. A tort is a violation of a duty established by law. When we go a step farther to include a tort which is insured against and where the funds come

into the insurance company for the sole purpose of paying the victims of torts, we find no reason to allow said insurance industry to say that they could appropriate prejudgment interest.

The allowance of prejudgment interest is a recognition that the past earning value of money, as well as the money itself, belongs to the prevailing plaintiff. Since that is so, prejudgment interest cannot be discretionery, The Court of Appeals opinion that prejudgment interest in wrongful death cases is discretionary is unfair and could lead to "judge shopping" by both parties. In this case over five years passed between the death and the entry of judgment; no settlement offer was ever received from Defendant Roosevelt. There is no reason why this Plaintiff should not recover prejudgment interest but some other plaintiff, before some other judge, could recover it. Prejudgment interest has always been held to be part of the damages in certain tort cases, especially conversion cases. Since it is a matter of right, the Court of Appeals erred in holding that such interest was discretionary. The Courts cannot allow a "discretion" about the legal meaning of "interest" as belonging to the owner of the money. This basic principle, which has been a part of New Mexico law since 1925, that interest is a part of the damages "law" and a part of the compensation, does not permit discretion by the trial court.

Since the interest earned in the past on the money belongs to the prevailing plaintiff, it is unconstitutional to take the money and give it to the defendant. Such a practice is in violation of the New Mexico Constitution, It amounts to a deprivation of property without due process. It also treats plaintiffs in wrongful death cases unequally - it denies them the earning power of their

money in violation of the State and Federal Constitutional provisions cited.

Prejudgment interest in wrongful death cases is a mandatory part of a plaintiff's recovery which should be added to the amount of the verdict by the trial judge. This issue was raised in the Court of Appeals in Point Four of the Brief-in-Chief. The Court of Appeals erred in holding that prejudgment interest was "discretionary" and that there was no abuse of discretion here.

2. Inadequacy of the damages is a Violation of Due Process, Equal Protection and Discriminatory.

The Court of Appeals Opinion on damges is in conflict with numerous decisions of the appellate courts in this state on damages and undisputed evidence. The measure of damages in a wrongful death case was established *Varney v. Taylor*, 77 N. M. 28, 34-35, 419 P.2d 234 (1966).

> "We think net income is the more realistic basis for arriving at the equivalent to compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased. Without intending to state a rule as to what should be deducted from gross earnings to arrive at a net figure, but only as an example, we point out that Federal and State income taxes and social security taxes are often substantial deductions from gross earnings and certainly are not a part of the decedent's income which his family could expect as direct pecuniary benefits."

In a decision in the same cse, *Varney v. Tylor*, 79 N.M. 652, 655, 448 P.2d 164 (1968) this Court stated:

> "in view of our holding that net income is the proper basis for measuring anticipated earnings of a

decedent, his estimated personal living expenses must be deducted to arrive at a realistic measure of damages which would reflect the pecuniary loss sustained by his wrongful death.

> "We do direct appellee to weight all of the evidence in the case and not arbitrarily disregard particularly important and qualified testimony whether it be a witness for the Commission or a witness for the utility, absent an exception to the rules set forth above."

The Court of Appeals Opinion rejects this standard for measuring wrongful death set out in *Varney*, supra, by holding that a jury can reject uncontradicted evidence of the net income loss caused by a death.

The Court of Appeals Opinion is in conflict with the Court's decision in *Alto Village Services Corp. v. N.M. Public Service Comm'n.*, 92 N.M. 323, 587 P.2d 1334 (1978). The issue there was the effect of an expert witness testimony, including testimony about future population growth and projected future earnings and expenses. The Court, referring to this expert testimony about future events, stated, at p. 326:

> "The rule is well established in this jurisdiction that the testimony of witnesses, whether interested or disinterested, cannot arbitrarily be disregarded by the trier of the facts unless any of the following appear from the record: (a) that the witness is impeached; (b) that the testimony is equivocal or contains inherent improbabilities; (c) that there are suspicious circumstances surrounding the transaction testified to; or (d) that there are legitimate inferences from the facts which cast doubt upon the truth or accuracy of the testimony. Tauch v. Ferguson-Steere Motor Company, 62 N.M. 429, 312 P.2d 83 (1957); Heron v. Gaylor, 52 N.M. 23, 190 P.2d 208 (1947); Medler v.

Henry, 44 N.M. 274, 101 P.2d 398 (1940). The rule applies in this case. We do direct appellee to weigh all of the evidence in the case and not arbitrarily disregard particularly important and qualified testimony whether it be a witness for the Commission or a witness for the utility, absent an exception to the rule set forth above."

The Court of Appeals Opinion is in conflict with the *Alto* decision in several respects. First, it confuses expert "opinions" with expert mathematical calculations. The economist was not giving her opinion in this case. Like the expert in *Alto*, she was using statistics and mathematical computations to project future events, as directed by *Varney*. Therefore, the Court of Appeals Opinion is in conflict when it states:

"Plaintiff contends that the testimony of the economist established a monetary worth of Strickland's life around $325,000.00, that an award of $105,000.00 shows that the jury disregarded both the testimony of pain and suffering and the testimony of the economist. The premise for this argument is that the testimony of the economist was uncontradicted. Because this testimony was uncontradicted, plaintiff asserts that she was entitled to a minimum award in the amount to which the economist testified. This claim is incorrect (A) procedurally and (B) on the merits.

"A. Procedure.

"The economist testified as an expert; the economist's damage testimony was an expression of an opinion. *VanOrman v. Nelson*, 78 N.M. 11, 427 P.2d 896 (1967), states:"

The Court of Appeals' Opinion is also in conflict with U.J.I. 18.30 which states, in part:

> "Your verdict must be based on evidence, not upon speculation, guess or conjecture."

The Court of Appeals states here, however, at p.5:

> "Plaintiff asserts the jury did not follow the instruction because the damage award was for a lesser amount than established by the evidence."

The Opinion seems to concede that damages of over $300,000 were established by the evidence, and not contradicted. Since that is so, and the award must be based on the evidence, the Court of Appeals' Opinion is in conflict with U.J.I. 18.30 when it states the jury can disregard the only evidence on the amount of damages.

The Court of Appeals' Opinion is also in conflict with *Varney*, supra, when it states, at p.7:

> "Plaintiff relies on the uncontradicted evidence rule stated in *Medler v. Henry*, 44 N.M. 275, 101 P.2d 398 (1940). Uncontradicted evidence is not required to be accepted as true if the evidence is equivocal. *State v. Chavez*, 78 N.M. 446, 432 P.2d 411 (1967). Evidence may be considered equivocal if the circumstances cast doubt on the accuracy of the evidence. *Lucero v. Los Alamos Constructors, Inc., Supra.*"

Plaintiff presented the economic proof required and endorsed, by *Varney*, supra. Since that type of evidence is required, it is erroneous and unfair to hold that such evidence is equivocal and can be rejected. The Court of Appeals is in conflict with *Varney* by rejecting economic testimony as too uncertain (page 8 of Opinion).

Although the Court of Appeals cites *Turrietta v. Wyche*, 54 N.M. 5, 212 P.2d 1041 (1949), it is in conflict with that case. *Turrietta* stated that:

"However 'speculative' such testimony may be, it is the best that can be produced to establish earning capacity over a period of years."

Plaintiff produced the best evidence available; such uncontradicted testimony cannot arbitrarily be disregarded.

The Court of Appeals' Opinion is in conflict with *Lahr v. Lahr*, 82 N.M. 223, 478 P.2d 551 (1970). The issue there was the weight to be given to a party's own opinion about the value of certain property.

THE OPINION ERRS IN LABELING THE ECONOMIST'S EVDENCE AS EXPERT-OPION RATHER THAN A STATISTICAL EVIDENCE THUS FALSELY JUSTIFYING A DISCRIMINATION AGAINST THE WIDOW IN VIOLATION OF 14TH AMEND. AND 42 U.S.C. 1983.

On p.6 under A Procedure, the Opinion says "the economist's damage testimony was an expression of an opinion" citing *Van Ormau vs. Nelson*, 78 N.M. 11, 427 P.2d 896 (1967) and a quote therein. The Opinion in our case states emphatic conclusions of fact and law. When these underlying factors are examined the conclusions are shown to be erroneous. There is no objective and equitable analysis of the whole fact or legal situation.

We have one clear example here. The Plaintiff's economist Melissa Patterson testified on the Damage issue but her testimony as in all Wrongful Death cases is *not primarily opinion testimony.* It is in the category of *statistical testimony* in the main.

3. Plaintiff's right to name the Defendant's liability carriers is a Constitutional one. This affects all the Defendants including the one dismissed by the Judgment below.

Naming Defendants' insurance carriers:

Security Insurance Company of Hartford, the workmen's compensation carrier, moved to file a complaint in intervention to assert its right to reimbursement. (Tr. 21) It was allowed to intervene (Tr. 67) and did file its Complaint as Plaintiff-in-Intervention. (Tr. 68-69) Four years later, after one trial and appeal, the compensation carrier changed its attitude and moved to be dismissed as an intervenor. Meanwhile, *Maurer v. Thorpe*, 95 N.M. 286, 621 P.2d 503 (1980), had introduced a Constitutional principle of "equal protection of the law", Art. II, Sec. 18, N.M. Const., into the picture.

Maurer, supra, t 288, established the rule that

> "a plaintiff, who is compelled by law to join his insurer and is then denied the right to name the defendant's insurance carrier as a party-defendant, is prejudiced in presenting his case and that such practice is fundamentally unfair and violates concepts of due process of law."

The Court's decision was based on the plaintiff's right to due process. The dangers inherent in not allowing defendants' insurers to be named when there is an insurance company plaintiff were outlined by the Court in *Maurer*, supra, at p. 287-188:

Based on the fact that there was an insurance company as a named plaintiff, Plaintiff Strickland moved to name the Defendants' insurance carriers (Tr. 422). That Motion was denied by the trial court. (Tr. 441). Plaintiff also made a Motion for New Trial based, in part, on the trial court's refusal to allow Defendants' insurers to be named. (Tr. 572-3). That Motion was denied. (Tr. 591). This issue was presented to the Court of Appeals in

Point Three of the Brief-in-Chief. The Court of Appeals affirmed the trial courts decision. When Plaintiff Strickland was denied the right to name the Defendents insurance carriers she was prejudiced in the presentation of her case . The jury was not truthfully informed of the status of the parties.

CONCLUSION

The New Mexico Court of Appeals ignored the existence of Constitutional rights to the case on appeal and substituted an absolute discretion which of itself was a "discrimination" and "unequal" application of the laws and a violation of "due process". Petitioner seeks protection. The full Opinion is reported in 657 P.2d 1184.

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Attorney for Petitioner

In the Court of Appeals of the State of New Mexico

No. 5645

RHODA ANN STRICKLAND
Appellant

v.

SECURITY INSURANCE CO., et al
Appellees

Bernalillo County
No. 77-03846

MANDATE

TO: DISTRICT COURT CLERK

(Applicable items are indicated by an "X" below.)

1. X Attached is a true and correct copy of the original decision entered in the above-entitled cause.

2. X This decision being now final, the cause is remanded to you for any further proceedings consistent with said decision.

3. Writ of Certiorari having been issued by the New Mexico Supreme Court and their decision now being final, this cause is remanded to you for any further proceedings consistent with said Supreme Court decision attached hereto.

4. You are directed to issue any commitment necessary for the execution of your judgment and sentence.

5. Cost Bill is assessed as follows:

6. District Court Clerk's Record returned herewith.
& Depositions

7. X Exhibits filed herein shall be picked up at this Clerk's Office forthwith.

By direction of and in the name of the Chief Judge of the Court of Appeals, this 7th day of February, 1983.
(SEAL)
cc: Counsel

s/Susan W. Baywell
Clerk of the Court of Appeals of the State of New Mexico.

(Tear off and return this receipt)

No. 5645

RECEIPT IS ACKNOWLEDGED of the original mandate

DATED:

Clerk of the District Court

APPENDIX B

OPINION OF COURT OF APPEALS OF STATE OF NEW MEXICO

WOOD, Judge.

Joseph Strickland was delivering a truckload of soil conditioner to Carter's farm. While unloading, with the bed of the trailer raised, the bed came close to overhead electric wires of the Electric Company (Roosevelt County Rural Electric Cooperative). Strickland was electrocuted. Plaintiff sought damages for wrongful death. The jury's verdict was in favor of Carter; its verdict was against the Electric Company. Plaintiff appeals; the Electric Company cross-appeals. There are five issues: (1) admission of evidence as to the height of the overhead wires; (2) the refusal to add the defendants' liability insurance carriers as party-defendants; (3) the damage award; (4) prejudgment interest; and (5) reimbursement of the compensation carrier.

The Damage Award

The jury verdict for wrongful death was $105,000.00. The jury failed to find negligence on the part of Strickland. Judgment for the entire amount of the verdict was entered in favor of plaintiff. Prior to entry of judgment, plaintiff moved for an additur or, in the alternative, for a new trial on the damage issue. *See Hammond v. Blackwell*, 77 N.M. 209, 421 P.2d 124 (1966). Plaintiff contends the trail court erred in denying the motions and asserts "[t]he jury's verdict must have resulted from prejudice, partiality, or a mistake on its part as to the measure of damages." *Hammond v. Blackwell*, supra.

The damage instruction was based on U.J.I. Civ. 18.30, N.M.S.A. 1978 (1980 Repl.Pamph.). Plaintiff asserts this instruction is mandatory in that it states the basis of a wrongful death. We agree, *see* the New Mexico decisions cited in the Committee Comment to U.J.I. Civ. 18.30. Plaintiff asserts the jury did not follow the instruction because

the damage award was for a lesser amount than established by the evidence. This contention confuses the *basis* for a damage award with the *amount* of a damage award. U.J.I. Civ. 18.30 states that the weight to be given to the evidence on the permissible items of damages is for the jury to determine. Although the evidence would have sustained an award of a greater amount, the fact that the verdict was for a lesser amount does not show that the jury failed to follow the instruction.

There was uncontradicted evidence that Strickland underwent pain and suffering between the time of the accident and his death. Plaintiff contends that the amount of the damage award shows that the jury disregarded this evidence. This argument overlooks how damages for pain and suffering are determined. There is no standard fixed by law for measuring the value of pain and suffering; rather, the amount to be awarded is left to the jury's judgment. *Mathis v. Atchison, Topeka and Santa Fe Railway Co.*, 61 N.M. 330, 300 P.2d 482 (1956). The jury was so instructed. *See* U.J.I. Civ. 18.7, N.M.S.A. 1978 (1980 Repl.Pamph.).

There was also testimony from an economist concerning Strickland's lost earnings between the death in 1976 and trial in 1981, and concerning lost future earnings. This earnings testimony went to the monetary worth of Strickland's life. *See* U.J.I. Civ. 18.30. There is no issue as to the admissibility of the economist's testimony. *See Wilson v. Wylie*, 86 N.M. 9, 518 P.2d 1213 Ct.App. 1973). The question is how that testimony must be treated by the fact finder.

Plaintiff contends that the testimony of the economist established a monetary worth of Strickland's life of around $325,000.00, that an award of $105,000.00 shows that the jury disregarded both the testimony of pain and suffering and the testimony of the economist. The premise for this argument is that the testimony of the economist was uncontradicted. Because this testimony was uncontradicted, plaintiff asserts that she was entitled to a minimum award

in the amount to which the economist testified. This claim is incorrect (A) procedurally and (B) on the merits.

A. Procedure

The economist testified as an expert; the economist's damage testimony was an expression of an opinion. *Van Orman v. Nelson*, 78 N.M. 11, 427 P.2d 896 (1967), states:

> The opinion of an expert although uncontradicted is not conclusive of the fact in issue. Jamison v. Shelton, 35 N.M. 34, 289 P. 593 (1930). An exception, however, is noted in Ross v. Sayers Well Servicing Co., 76 N.M. 321, 414 P.2d 679 (1966). The fact finder may reject expert opinion evidence in whole or in part. Lopez v. Heesen, 69 N.M. 206, 365 P.2d 448 (1961).

The exception noted in the above quotation involves proof of causation as a medical probability in a compensation case; thus, the exception is not applicable. *See Lucero v. Los Alamos Constructors, Inc.*, 79 N.M. 789, 450 P.2d 198 (Ct.App. 1969).

The jury was instructed:

> You should consider each expert opinion received in evidence in this case and give it such weight as you think it deserves. You may reject it entirely if you conclude the opinion is unsound.

See U.J.I. Civ. 2.13, N.M.S.A. 1978 (1980 Repl.Pamph.).

Plaintiff did not object to this instruction which informed the jury that it could give the economist's damage testimony such weight as the jury thought it deserved. Not having objected to this instruction, plaintiff may not complain of the jury's failure to accept 100 percent of the economist's testimony. *See* R.Civ.P. 51(I), N.M.S.A. 1978 (1980 Repl.Pamph.).

B. Merits of Plaintiff's Contention

Plaintiff presents two arguments concerning uncon-

tradicted testimony. First, plaintiff points out that the Electric Company introduced no evidence concerning the monetary worth of Strickland's life, and asserts that such evidence could have been produced and could have contradicted the testimony of the economist. Plaintiff seems to assert that the *failure* of the Electric Company to produce such evidence requires a verdict in the amount of the damage testimony introduced by plaintiff. This argument fails to recognize that the burden of persuading the jury as to the amount of damages was upon the plaintiff; the Electric Company had no such burden. *See* U.J.I. Civ. 3.6, N.M.S.A. 1978 (1980 Repl.Pamph.); *Wallace v. Wanek*, 81 N.M. 478, 468 P.2d 879 (Ct.App. 1970).

Second, plaintiff relies on the uncontradicted evidence rule stated in *Medler v. Henry*, 44 N.M. 275, 101 P.2d 398 (1940). Uncontradicted evidence is not required to be accepted as true if the evidence is equivocal. *State v. Chavez*, 78 N.M. 446, 432 P.2d 411 (1967). Evidence may be considered equivocal if the circumstances cast doubt on the accuracy of the evidence. *Lucero v. Los Alamos Constructors, Inc., Supra.*

We do not list all of the testimony that was equivocal, the following examples are sufficient:

(a) On the basis of Strickland's age, the economist used a work-life expectancy of 34.25 years. This figure was obtained from tables prepared by the U.S. Department of Labor for all male workers in the United States of Strickland's age. The work-life expectancy table included truck drivers, but the work-life expectancy was not specific for truck drivers. The work-life expectancy table states an average of how long people work, "some people work longer and some people work for shorter lengths of time."

(b) Earnings of $12,000 to $13,000 for 1976 were projected as a basic wage for the length of the work expectancy with an increase of 8 percent each year. On

this basis, Strickland would have been making over $160,000.00, as a truck driver, in the year 2009. As the economist stated: "That is shocking when we look at it projected that many years into the future . . . ."

(c) The 8 percent wage increase every year "would include both price and productivity". "Price" seems to means wage increases due to inflation; a five to six percent price increase was projected for every year for 34.25 years. "Productivity" was explained as more efficient truck driving; a two to three percent productivity increase was projected every year for 34.25 years.

(d) The 8 percent wage increase every year was an average for all truck drivers without regard to the type of truck driving done by Strickland. The higher income of long-haul drivers was included in this average. There is evidence that Strickland did not like long-haul driving.

(e) In figuring how much should be deducted from gross earnings for Strickland's personal maintenance, the economist used a Department of Labor "budget" prepared for Denver, Colorado because that was the closest government "budget"; no "budget" was available for Albuquerque. However this cost "does have to do with locality."

The economist's damage testimony was based on the view that Strickland would have an average work life, would have an 8 percent wage increase every year of the work life and that Strickland, an Albuquerque resident, would have the same cost for personal maintenance as a hypothetical person in Denver as determined by a government "budget" of undisclosed detail. This testimony is not at all comparable to an owner's valuation of real estate for the purpose of dividing community property in a divorce action. *See Lahr v. Lahr*, 82 N.M. 223, 478 P.2d 551 (1970), where the uncontradicted evidence rule was applied.

The predictive abilities of economists have not ad-

vanced so far that they can forecast the work life or the wage increases for an individual over a period of thirty years. *See Bach v. Penn Central Transportation Co.*, 502 F.2d 1117 (6th Cir. 1974). Their predictions involve a "plethora of uncertainties". *See* concurring opinion of Judge Friendly in *Feldman v. Allegheny Airlines, Inc.*, 524 F.2d 384 (2d Cir. 1975).

Turrietta v. Wyche, 54 N.M. 5, 212 P.2d 1041, 15 A.L.R.2d 407 (1949), held that testimony similar to that of the economist was admissible to prove future earning capacity, but recognized the limitations of such testimony. *Turritta* states:

> It is all problematical at best. It is not questioned that mortality tables are admissible, but possibly not one time in fifty would the life expectancy of any individual come within a year of the actual length of his life. It is, to say the least, problematical whether he would continue to live, continue to work, continue to work with much the same effort and ability he has shown in the past, continue to have the desire and the opportunity to work. Also, that the amount of wages paid him and those following his occupation generally in the past, will continue to be paid, that the wage scale will not be materially affected by depression, strikes, inflation, or war; that interest rates will remain much as they are. However "speculative" such testimony may be, it is the best that can be produced to establish earning capacity over a period of years. A jury of twelve average citizens ordinarily can be depended on to assess damages fairly, after they have heard and considered such evidence.

Damage testimony based on projections of assumptions does not come within the uncontradicted evidence rule stated in *Medler v. Henry, supra*, and need not be taken as true by the fact finder; the jury was not required to accept the economist's testimony as true in this case.

The contentions relied on by plaintiff, to show that the verdict resulted from prejudice, partiality or a mistaken measure of damages, are without merit.

Prejudgment Interest

Plaintiff's request for prejudgment interest was denied. The judgment entered February 1, 1982 bears interest at 6 percent from date of entry. Plaintiff contends she is entitled to prejudgment interest of 10 percent.

Plaintiff's briefs present numerous arguments for an award of prejudgment interest in a wrongful death case. We do not identify or answer these arguments. The only record of this issue being raised in the trial court is included in the order disposing of several post-trial motions. That order states "that pre-judgment interest requested by the plaintiff is hereby denied." There being no showing that plaintiff's arguments were raised in the trial court, we do not consider them. R.Civ.App. 11, N.M.S.A. 1978. The only issue we discuss is a legal one—whether prejudgment interest may be allowed in a wrongful death case. *Compare DesGeorges v. Grainger*, 76 N.M. 52, 412 P.2d 6 (1966).

Most prejudgment interest decisions in New Mexico involve breach of contract. The rule most helpful to plaintiff in those decisions is that where the amount of damages is uncertain until fixed by the judgment, the allowance of prejudgment interest is discretionary. *Shaffer v. Kelton*, 95 N.M. 182, 619 P.2d 1226 (1980); *Kennedy v. Moutray*, 91 N.M. 205, 572 P.2d 933 (1977). *State T. & S. Bk. et al. v. Hermosa L. & C. Co.*, 30 N.M. 566, 240 P. 469 (1925), suggests that as a matter of fairness the same rule should apply in tort cases if the date of the tort is ascertainable.

Even if prejudgment in a tort case is allowable, "its allowance as damages rests in the discretion of the jury." *DePalma & Ruppe v. Weinman & Barnett*, 15 N.M. 68, 103 P. 782 (1909). *DePalma* held that the trial court erred

in instructing the jury to allow interest on any damages awarded; that it was for the jury to determine whether interest should be awarded.

On the specific question of the allowance of prejudgment interest in wrongful death cases, *Annot.*, 96 A.L.R.2d 1104, 1107 (1964), states:

> [I]t should be noted that since an action for wrongful death is a creature of statute, the compensation . . . which may be recovered in such an action is limited by the enactment creating the right, and therefore, in determining what damages are recoverable, the court must look primarily to the wrongful death statute.

If prejudgment interest is recoverable for wrongful death, then further questions must be answered. The Annotation, at 1108, states:

> In state courts the question under discussion appears to have been treated from two standpoints: (1) whether prejudgment interest may be allowed by the jury or trier of facts in their discretion, and (2) whether it is recoverable as a matter of right. Although there are some exceptions and qualifications, it appears to be the general view that prejudgment interest on wrongful death damages (1) may be allowed in the discretion of the jury or trier of facts, and (2) may not be added to the jury verdict by the court or clerk in the absence of express statutory provision.

It is unnecessary to decide the various questions concerning prejudgment interst in wrongful death cases. Under New Mexico decisions, the view most favorable to plaintiff is that prejudgment interest in a wrongful death case is a matter of discretion. Assuming, but not deciding, that this is the correct view, the appellate issue is whether the trial court abused its discretion in denying prejudgment interest.

We comment on only one of the arguments concerning abuse of discretion — that of the delay occurring prior to the trial in 1981. The Electric Company argues that plaintiff was responsible for the delay; in support of this argument, documents, purportedly of federal court proceedings, are attached to the Electric Company's brief. These documents have not been considered. Not having been introduced in the trial court, the documents are not part of the record to be reviewed, and were improperly attached to the brief. *Baca v. Swift & Company*, 74 N.M. 211, 392 P.2d 407 (1964).

The record does not show an abuse of discretion in the denial of prejudgment interest; thus under the assumption most favorable to plaintiff, denial of prejudgment interest was not error.

The trial court correctly orderd the judgment to bear interest at 6 percent. The increase in the interest rate stated in § 56-8-3, N.M.S.A. 1978 (1982 Cum.Supp.), from 6 percent to 10 percent, was enacted in 1980. The increased rate did not apply to the complaint, filed in 1977. *Hillelson v. Republic Ins. Co.*, 96 N.M. 36, 627 P.2d 878 (1981).

Reimbursement of the
Compensation Carrier

After verdict, but prior to judgment, Security moved that the trial court order that it be reimbursed for compensation paid, and to be paid until reimbursement actually occurred. Plaintiff filed an affidavit opposing the motion; Security filed a counter affidavit. The trial court ordered that Security be reimbursed out of the judgment for $105,000.00. The amount of reimbursement was $33,133.72 up to trial, plus the amount of compensation paid subsequent to trial. The trial court also denied plaintiff's request that Security's reimbursement be either reduced or eliminated. Plaintiff claims these rulings were error. The contentions, and our answers, follow.

(a) Plaintiff claims that she should not be compelled to reimburse Security because the result will be that plaintiff will end up receiving less than she would have received in compensation benefits; the "wrongful death recovery should not operate to destroy the benefits of the compensation act." *Castro v. Bass*, 74 N.M. 254, 392 P.2d 668 (1964), states:

> [W]hen damages are sought and recovered from the tortfeasor, the amount of the recovery is for the full loss or detriment suffered by the injured party and makes him financially whole.
>
> * * *
>
> Plaintiff having recovered . . . [her] damages representing payment in full for . . . [her] injuries . . . [she] may not therafter claim compensation in addition.

See Seminara v. Frank Seminara Pontiac-Buick, 95 N.M. 22, 618 P.2d 366 (Ct. App. 1980).

(b) Plaintiff asserts that Security should be barred from any reimbursement because Security "actually impeded and obstructed the Plaintiff and tried to and did assist the Defendants." This argument is frivolous. Examples are: (1) Plaintiff contends obstruction is shown because of Security's efforts to delay its intervention until after verdict, thus attempting to prevent plaintiff from having the liability insurance carriers of defendants as parties. This was answered in the second issue of this opinion. (2) A witness for Security testifid as to the amount of compensation paid and concerning Carter's written statement. Plaintiff asserts this witness's testimony was slanted. There was no slanting in this testimony. (3) Plaintiff claims Security took steps to minimize the amount of plaintiff's recovery. Security's participation in the trial was minimal, and it must be remembered, Security was present at the trial at plaintiff's insistence. Security's closing argument, three typewritten pages in its entirety, reminded the jury of evidence favorable to plaintiff that was obtained through Security, that Security

sought only its reimbursement, that the compensation payments were not adequate for the actual loss and the jury should award damages both for monetary loss due to the death and, in addition, for pain and suffering.

(c) Plaintiff asserts that Security should bear a portion of the costs of the litigation inasmuch as Security is to be reimbursed from plaintiff's recovery. Security does not dispute that apportioning costs is proper. *Transport Indemnity Company v. Garcia*, 89 N.M. 342, 552 P.2d 473 (Ct.App. 1976). There is no suggestion as to the amount of the costs that should be apportioned. All we are presented with is the claim that apportionment should occur, and that the trial court refused to apportion. Although no monetary amounts were referred to in the trial court, the affidavit and counter affidavit differ as to costs borne by Security, and differ as to any agreement to share costs. In light of these differences and not being informed as to any monetary amounts, we have no basis to hold that the trial court's refusal to apportion was erroneous.

(d) Plaintiff contends that the amount of Security's reimbursement should be relied on the *Continental Gas* table principles. The cases relied on are *Continental Gas Co. v Wueschinski*, 95 N.M. 733, 625 P.2d 1250 (Ct.App. 1981) and *White v. Sutherland*, 92 N.M. 187, 585 P.2d 331 (Ct.App. 1978). Neither case is applicable. The amount of the worker's recovery (*White*) or potential recovery (*Continental*) was a sum available from insurance proceeds. A sufficient distinction is that neither case involved a verdict establishing the "full loss" making the plaintiff "financially whole". *See Castro v. Bass, supra. White* involved a settlement at no more than 10 percent of the damages; the jury verdict in this case established plaintiff's "full loss", and judgment was entered for the full amount of the jury verdict. Having been made "financially whole" by the damage award, plaintiff may not retain both the compensation benefits and the damages recovered. Section 52-1-56(C), N.M.S.A. 1978; *Reed v. Styron*, 69 N.M. 262, 365 P.2d 912 (1961). There is no factual

basis for reducing the amount of Security's reimbursement on the basis of equitable principles.

The judgment is affirmed. No appellate costs are awarded.

IT IS SO ORDERED.

Joe W. Wood, Judge

WE CONCUR:

Ramon Lopez, Judge

Thomas A. Donnelly, Judge

Full Opinion found in 657 P.2d 1184.

Appendix C

MOTION FOR REHEARING WHICH INCLUDES ASSERTIONS OF FEDERAL ISSUES UNDER 14th AMENDMENT, U.S. CONSTITUTION

The Opinion misconstrues the Appellant's argument on wrongful death damages.

Briefly stated "the jury in a Wrongful Death case should not be allowed to decide questions of law". U.J.I. prohibits certain items of damage from the jury's consideration, e.g. "loss of decedent's society to the family" and a jury would not be able to change the law by considering the prohibited items.

The Defendant would not have a burden of persuasion to persuade a jury not to make an award based on the prohibitions in the U.J.I. The instruction is equally mandatory in stating affirmatively what the essentials of damages are. When the U.J.I. say "should" the language is "mandatory". The Plaintiff should not bear a burden of convincing a jury that the Supreme Court's decision on which the U.J.I. is based is reasonable. Under such a ruling the Plaintiff is being denied equal protection of the laws. Use of an economist seems to be universal practice and a formula has been used based on statistics to arrive at a figure. When the evidence is uncontradicted, the jury is the judicial body speculating when they refuse to follow the uncontradicted testimony. As one example, the whole life insurance business is predicated on the statistic of a mortality table and the Supreme Court has adopted that approach. It is certainly never intended to be a prophecy but our argument is that a Plaintiff can in reality be deprived of a wrongful death case if the mortality tables are disregarded. The Opinion gives to a jury the right to second guess the expert if they don't agree with any of the projections based on statistics. *Padgett v. Buxton-Smith Mercantile*, 262 F2d 39, lays down the fundamental premise for using an expert at all. It is to enlighten the jurors on a subject which is beyond the

knowledge of an ordinary lay person. It would be a usurpation of a judicial function for an expert to testify to an opinion which the average lay person could readily form. Contrarywise, our position is that a jury cannot usurp the position of an expert when the subject is a technical one and where the results are a compilation of statistics and not merely an opinion. The basic premise of our argument is that the components of damages in New Mexico are established by the Supreme Court and not the expert. The basis for the Supreme Court establishing components is that the lifetime earnings are to be a projection of those items existing at the time of death and that is basically why we submit that the jury was arguing with the Supreme Court's ruling on damages. Projections from statistics are per se based on averages but having allowed damages for wrongful death in a manner different from Lord Campbell's lump sum, our Supreme Court has tried to make it as mechanical as a fixed lump sum. When U.J.I. says that a "reasonable discount should be made", certainly the jury could not disregard that and fail to apply it. Therefore, we submit that the Plaintiff is denied the same rights that a defendant has and therefore we have an unconstitutional situation where a Plaintiff is denied the equal protection of the laws in violation of Art. II, Sec. 18, of the New Mexico Constitution and against the 14th Amendment to the Constitution of the United States. There are noteworthy decisions like *Paddock v. Schuelke*, 81 N.M. 759, 473 P.2d 373, which require a directed verdict because the evidence is all one way. It is true that liability facts are real world physical facts and a witness sees what he sees, but Melissa Patterson is only stating a compilation of items mandated by the Supreme Court as to what should be included and excluded.

Padgett v. Buxton-Smith Mercantile, supra, rejected an expert's opinion because the jury was just as good a judge of the subject matter as the lay expert, but in the instant case, the jury in reality refused a qualified expert's opinion on what the law of damages should be and the expert was the Supreme Court of New Mexico. Melissa Patterson only did what that Court required her to do.

Plaintiff's have a hard time with the restrictions of the Wrongful Death Statute. The only persuasive part of the whole Instruction is that the Supreme Court said plaintiffs had to do it this way. We would ask a reconsideration of this problem.

APPELLANT ASKS A RECONSIDERATION OF THE *OPINION ON THE PRE-JUDGMENT INTEREST*

Argument was made that the interest on mony wherever and whenever belongs to the person who owns the money. The contention was that this is a true economic fact accepted in financial circles and it was further contended that actual possession of the money was not necessary.

The Opinion says that "the view most favorable to Plaintiff is that pre-judgment interest in a wrongful death case is a matter of discretion". This discretion is not defined in the Opinion but we submit that a "discretion" in the trial court which enables a universally accepted financial practice to be disregarded without any guiding principles for the exercise of that discretion is something other than a judicial discretion and would in a wrongful death case be unconstitutional as a taking of one's property and giving it to another without due process of law, in violation of Art II, Sec. 18, of the New Mexico Constitution and 14th Amendment of the United States Constitution.

Stated otherwise, what legal or constitutional right exists in a defendant or his insurance carrier which enables him to keep the earning power of money that belongs to another? Certainly a judicial "discretion" is not an adequate basis. We also request a reconsideration because of the financial advantage occurring to the defendant or his insurer by delaying a settlement or not settling at all.

The second to last paragraph in the Opinion seems to hold that pre-judgment interest is not allowed legally but that the Plaintiff might be able in an undescribed

situation to show that this was unjust. We request a revaluation of basic property rights relative to "interest" and New Mexico law on this subject.

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APPENDIX D

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

DECEMBER 22, 1982

RHODA ANN STRICKLAND, as Personal Representative of the Estate of JOSEPH KAY STRICKLAND, Deceased,

Plaintiff-Appellant/ Cross-Appellee,

No. 5645
D.C. No. 77-03846

and

SECURITY INSURANCE COMPANY OF HARTFORD,

Plaintiff in Intervention-Appellee,

vs.

ROOSEVELT COUNTY RURAL ELECTRIC COOPERATIVE,

Defendant-Appellee/Cross-Appellant,

and

CYRIL E. CARTER,

Defendant-Appellee.

JOE E. WOOD
Presiding Judge

RAMON LOPEZ
THOMAS A. DONNELLY
Judges

In this cause, a motion for rehearing having been filed by Appellant, and consideration having been had by all of the members of the original panel,

IT IS ORDERED that the motion for rehearing be DENIED.

s/ Joe W. Wood
Presiding Judge

ATTEST: A true copy
s/ Susan W. Baywell
Clerk of the Court of Appeals
of the State of New Mexico

By: s/ Jane Gurule
Deputy

Appendix E

Appellant's Brief-in-Chief raised Federal issues under 14th Amend., U.S. Const. on pgs. 29, 30 as follows:

> "The substantial rise in interest rates in recent years is a fact to be considered as of now and alters decisions made forty to ninety years ago for *Constitutional* reasons. *The most basic premise is the definition of interest as being the earning power of money, which belongs to the owner of the money. This ownership of property (money) is protected by the Constitutional due process clause* in both the State and Federal Constitution. Art. II, Sec 18 and the 14th Amendment. We submit that the New Mexico Constitution provision requiring "due process" and also "equal protection" of the laws takes precedence over Art. IV, Sec. 34 and also the 14th Amendment protecting all citizens of the various states in their property rights."

Also, Petition for Rehearing to New Mexico Court of Appeals raised U.S. Constitutional issues and is included in the Appendix. Appellant's Brief in Chief said Plaintiff is denied "equal protection of the laws, Art. II, Sec. 18, N. M Const. and 14th Amend., U.S. Const.", p. 31.

Appendix F

Webster's Third New International Dictionary defining "Interest".

Black's Law Dictionary, Fifth Ed., p. 729, defining "Interest": "The most general term that can be employed to denote a right, claim, title, or legal share in something. In its application to lands or things real, it is frequently used in connection with the terms 'estate,' 'right,' and 'title.' More particularly it means a right to have the advantage accruing from anything; any right in the nature of property, but less than title."

Appendix G

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Harry E. Stowers, Jr., District Judge, presiding, and the issues having been duly tried and the jury having returned its verdict in favor of the plaintiff and against the defendant Roosevelt County Rural Electric Cooperative in the sum of $105,000.00 and also having returned a verdict in favor of defendant Cyril E. Carter.

IT IS ORDERED AND ADJUDGED that plaintiff is awarded judgment against defendant Roosevelt County Rural Electric Cooperative in the amount of One Hundred Five-Thousand Dollars ($105,000.00) together with the costs of this action. Judgment is hereby entered in favor of the defendant Cyril E. Carter with costs against the defendant Roosevelt County Rural Electric Cooperative. Judgment against Roosevelt County Rural Electric Cooperative is to bear interest at the rate of six percent (6%) per annum from the date of the filing of this Judgment. The Plaintiff in Intervention shall recover from the above amount all compensation paid and to be paid.

HARRY E. STOWERS, JR.
District Judge

ORDER

The following matters having come before the Court in the form of post-trial motions and objections and the Court having considered the matter, makes the following rulings:

. . . The Court rules that pre-judgment interest requested by the plaintiff is hereby denied. The Court further orders that plaintiff's request for a reduction or elimination of workmen's compensation amount paid by the Security Insurance Company of Hartford is hereby denied.

HARRY E. STOWERS, JR.
District Judge

UJI 14.17
DAMAGES—WRONGFUL DEATH

If you should decide for the Plaintiff on the question of liability you must then fix the amount of damage which will be equivalent to compensation, not for the loss of life itself, but rather for the loss of pecuniary benefits which might reasonably have been expected from the continued life of the deceased. In arriving at the amount of such pecuniary benefits, deduction must be made from gross earnings or earning capacity, if any, to cover income taxes, social security taxes and any other taxes or deductions which would be made or paid before the family could expect any pecuniary benefits from the deceased.

In fixing the amount of damages, allowance must be made for the fact that the pecuniary benefits reasonably to have been expected from the deceased are being aggregated and paid in cash and a reasonable discount should therefore be made for the earning power of such money.

In fixing damages the jury should consider the proof, if any, as to age, earning capacity, health, habits and probable duration of life of the deceased but should not consider any of the following factors:

1. The pain and suffering to the decedent, if any.

2. The loss of decedent's society by the (widow) and (next of kin).

3. The grief or sorrow of the (widow) and (next of kin).

4. The property or wealth of the survivors or of the defendants.

Your verdict must be based upon evidence, not upon speculation, guess or conjecture; and, you must not permit the amount to be influenced by sympathy or prejudice.